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No. 42

In the

Supreme Court of the United States

OCTOBER TERM, 1940

THE UNITED STATES OF AMERICA, PETITIONER

v.

SALVATORE FALCONE, JOSEPH FALCONE, HENRY ALBERICO, NICHOLAS NOLE, AND JOHN NOLE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS, SALVATORE FALCONE AND JOSEPH FALCONE.

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INDEX

	PAGE
Jurisdiction	1
Opinion Below	1
Question Presented	2
Statutes Involved	2
Statement	2
Summary of Argument	6
Argument	8
Conclusion	19

CITATIONS.

Cases:

Abrams vs. *United States*, 250 U. S. 616	10
Backun vs. *United States*, 112 F. (2d) 635	12
DiBonaventura vs. *United States*, 15 F. (2d) 494	18
Hicks vs. *United States*, 150 U. S. 442	10
People vs. *Zucker*, 20 App. Div. (N. Y.) 363 at 365	14
Santa Cruz Co. vs. *Labor Board*, 303 U. S. 453	15
State vs. *Coleman*, 126 Fla. 203	15
United States vs. *Peoni*, 100 F. (2d) 401	12
Young vs. *United States*, 48 F. (2d) 26	17, 18

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JURISDICTION

The United States Circuit Court of Appeals for the Second Circuit by a judgment entered March 4, 1940, reversed a judgment of the United States District Court for the Northern District of New York convicting the respondents of the crime of conspiracy to commit offenses against the United States. This Court on May 20, 1940, granted the Government's petition for certiorari.

OPINION OF COURT BELOW

The opinion of the Circuit Court of Appeals is reported in 109 F. (2d) 579.

QUESTION PRESENTED

Whether the seller of goods, in themselves innocent, becomes a conspirator with or an abettor of the buyer because he knows that the buyer means to use the goods to commit a crime.

STATUTES INVOLVED

Section 37 of the Criminal Code (U. S. C., Title 18, Sec. 88), the pertinent part thereof, providing as follows:

> If two or more persons conspire * * * to commit any offense against the United States * * * and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy, shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Section 332 of the Criminal Code (U. S. C., Title 18, Sec. 550), providing as follows:

> Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

STATEMENT

Salvatore Falcone and Joseph Falcone, respondents, were on June 27, 1939, in the United States District Court for the Northern District of New York, convicted of the crime of conspiracy to violate the Internal Revenue laws. The sections of the

United States Code which the indictment charged the conspiracy offended are nine in number and relate to the regulation of the manufacture of distilled spirits. For convenience we may accurately state that the indictment charged a conspiracy to operate stills in violation of the Internal Revenue laws.

Sixty-eight defendants were named in the indictment. Thirteen persons other than the defendants were named as co-conspirators and not indicted. Some of the defendants pleaded guilty, a severence was granted another. Some had not been apprehended at the time of the trial. Some were indicted under fictitious names and were neither apprehended nor identified. Forty-two of the defendants were jointly tried. The case against twenty-four defendants went to the jury. Three were found not guilty and twenty-one were found guilty. Eight of the defendants appealed from the judgment of conviction to the United States Circuit Court of Appeals, Second Circuit. The convictions of three were affirmed and of five, including these respondents, reversed.

Joseph Falcone during the year 1937 was a jobber in sugar, and between March 1, and September 14, purchased through Turner Brothers, sugar brokers, 120 Wall Street, New York City, eighty-six hundred bags of sugar, each of one hundred pounds. (R. 74, Exhs. 446–447.) The purchases were made in various lots during that time.

All of this sugar was disposed of by Joseph Falcone as follows: To F. Bonomo & Co., Wholesale Grocers, Utica, New York, five thousand seven hundred and seven bags (R. 76, Exh. 473); to Pauline Aiello, Wholesale Grocer, Utica, New York, two thousand ninety-two bags Exhs. UU–II, VV); eight hundred bags to Alberico & Funicello, Wholesale Grocers, Utica, New York. (Exhs. VV–I; WW.)

These sales account for all the sugar purchased by Joseph Falcone during 1937 except one bag which was lost in transit. (R. 97.)

No attempt was made by the Government and no proof was offered to show that any sugar was sold by Joseph Falcone to any distiller or was diverted by him to any unlawful purpose.

On September 15, 1937, Joseph Falcone was present near the wholesale grocery company warehouse of Bonomo & Co., while sugar was being delivered to the wholesale warehouse. The truck driver was having a difficult time entering the driveway and Joseph Falcone indicated with his hand whether to go to the right or to the left. (R. 66–67.) An observer saw marks on two bags indicating the date the sugar was packed at the refinery. (R. 70.)

On September 30, 1937, sugar bags bearing these date marks were found at a still and on January 17, 1938, sugar bags were found at another still and among them were bags having the same refinery packing date as one of the bags observed in the truck near Bonomo's wholesale warehouse. (R. 44.)

Salvatore Falcone is a brother of Joseph Falcone. They had been in the wholesale grocery business under the name of S. Falcone & Bro., in the hide and skin business under the name of Valley Hide & Skin Company, and after repeal in the beer distributing business under the name of S. Falcone & Bro. Salvatore Falcone was in the broom manufacturing business under the name of Peerless Broom Brush Mills and in the cheese manufacturing business under the name of Falcone Cheese Company. (R. 95.)

Salvatore Falcone had given his brother, Joseph, a power of attorney on his bank account (Exh. 398) and Joseph had given Salvatore a power of attorney upon his bank account. (Exh. 399.)

Salvatore under the power of attorney on March 31, 1937, drew a check on Joseph's account to the order of First Citizens Bank and Trust Company in the sum of $4,679.50. On the face of the check is a notation that it is in payment for one thousand bags of sugar. The bank in turn issued its check to the order of Greenspan Brothers, sugar refiners, in the same amount. (Exhs. 407–408.) On April 7, 1937, Salvatore Falcone, under the power of attorney, drew a check on Joseph's account to the order of Greenspan Brothers in the sum of $4,679.50. On the face of the check in the form provided thereon is the notation that it is in payment for one thousand bags of sugar. (Exh. 410.)

SUMMARY

The proposition of law, decided by the Circuit Court of Appeals, is as follows:

> That the seller of goods, in themselves innocent, does not become a conspirator with—nor what is in substance the same thing, an abettor of—the buyer, because he knows that the buyer means to use the goods to commit a crime.

The question presented to this Court by the Government is:

> Whether one who knows of the existence of a conspiracy to produce distilled spirits in violation of the Internal Revenue laws and knowingly provides essential materials by selling them to the conspirators or to their immediate vendors, may be convicted as a co-conspirator.

The question presented by the Government differs from the rule followed by the Circuit Court.

> (a) In it is omitted the important element, that the goods be "in themselves innocent."
>
> (b) The question assumes the respondents knew of the existence of a conspiracy.

The rule followed by the Circuit Court of Appeals is applicable to this particular case. It cannot be broadened to comprehend facts and circumstances not presented in this case.

Mere knowledge that a customer will sell to someone who means to use sugar for an illegal purpose does not make the seller a conspirator with the unlawful user.

The Court below found no evidence of an intent on the part of these respondents to commit a crime. There is no such evidence in the case.

Sharing in the stake in the enterprise, promoting the venture himself, making the venture his own are all elements evidentiary of intent, and are lacking in this case.

Failure to forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use, does not establish a person as a conspirator with the unlawful user.

The Government's proposal to leave to the restraint of prosecutors and the conscience of juries whether one who comes squarely within its definition of a conspirator under its theory, should be found guilty is unsound and dangerous.

There do exist degrees of culpability, degrees of crime, but there can be no degree of the fact of guilt. One is either guilty or innocent of crime.

There is no evidence and no claim that these respondents ever sold sugar to illict distillers.

In the case of Joseph Falcone, the Circuit Court of Appeals assumed the evidence to be enough to charge him with notice that his customers were supplying the distillers.

In the case of Salvatore Falcone, the Circuit Court of Appeals found, referring to sugar sold by his brother, there is really nothing to show that he knew its eventual destination.

The decision of the Circuit Court of Appeals that the evidence was insufficient to establish the guilt of these respondents is correct and should be affirmed.

ARGUMENT

THE SELLER OF GOODS, IN THEMSELVES INNOCENT, IS NOT A CONSPIRATOR WITH NOR AN ABETTOR OF THE BUYER BECAUSE HE KNOWS THAT THE BUYER MEANS TO USE THE GOODS TO COMMIT A CRIME.

In the opinion of the Circuit Court of Appeals, written by Judge Learned Hand, this question is propounded:

> Whether the seller of goods, in themselves innocent, becomes a conspirator with—or, what is in substance the same thing, an abettor of—the buyer because he knows that the buyer means to use the goods to commit a crime? (R. 236.)

The Court then answered the question in the negative.

The Government's appeal must stand or fall on that question. The inquiry may not be broadened. Neither the verbiage nor the meaning of the question is elastic. It may not be stretched to cover abstract cases. Words or phrases of the question may not be omitted; nor may words be substituted

to broaden the scope of the question beyond the limit in the mind of the Court which delivered the opinion.

Analysis of the question reveals two basic elements of the hypothesis:

(1) The goods sold must be in themselves innocent.

(2) Knowledge on the part of the seller of the use to which the buyer means to put the goods.

The question comprehends no other facts. The rule of law enunciated, was applied to the facts of this case, and is limited by the Court to the facts found or assumed.

The question presented by the government in its brief, differs widely in verbiage, in substance and in meaning from the question asked and answered by the Circuit Court of Appeals.

First, it omits an important element of the rule followed by the Circuit Court, that the goods must be in themselves innocent. Second, it assumes knowledge on the part of the seller not only that the *buyer means* to use the goods to commit a crime, but knowledge of the existence of a conspiracy.

Neither the evidence nor the opinion of the Circuit Court of Appeals warrants this all-embracing assumption.

In the opinion, Judge Hand went no further in the case of Joseph Falcone than to "assume that the evidence was enough to charge him with notice that

his customers were supplying the distillers." In the case of Salvatore Falcone, the opinion states: "The evidence against Salvatore Falcone went no further than to show in various ways that he helped his brother in purchase of sugar during the period in question. There is really nothing to show that he knew its eventual destination." (Opinion, R. 234–235.)

In the case of Salvatore Falcone, therefore, the Circuit Court has made a conclusion that as to him there is no evidence to show knowledge that any buyer meant to use sugar for a criminal purpose. As to Joseph the assumption is not that he was selling to distillers, but that he was chargeable with notice that his customers were selling to distillers.

There is nothing in the evidence nor in the assumption of fact by the Circuit Court of Appeals to warrant a finding of intent to further the aims of a conspiracy. Forgetting, for the moment, that the question of the Circuit Court does not assume knowledge of the conspiracy, the fact is Joseph Falcone was selling to wholesale grocers sugar, an everyday, innocent commodity.

Mere knowledge that his customer would sell to someone who would use the sugar for an illegal purpose, could not make him a conspirator in its unlawful use. As the Government concedes in its brief (page 22) "accessorial assistance must be intentional for criminal responsibility to attach." *Hicks* v. *United States*, 150 U. S. 442. The dissenting opinion of Mr. Justice Holmes in *Abrams* v. *United*

States, 250 U. S. 616, quoted in part in the Government's brief, is directly applicable here. At page 626 and 627 Mr. Justice Holmes states:

> I am aware, of course, that the word "intent" as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue. Even less than that will satisfy the general principle of civil and criminal liability. A man may have to pay damages, may be sent to prison, at common law might be hanged, if at the time of his act he knew facts from which common experience showed that the consequences would follow, whether he individually could foresee them or not. But, when words are used exactly, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed. It may be obvious, and obvious to the actor, that the consequence will follow, and he may liable for it even if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind.

The opinion of the Circuit Court of Appeals on its face, shows that in the case of the respondents the Court failed to find any evidence of intent. The reasoning, upon which the application of the rule, applied to the facts, is based, demonstrates this. In

other words, to put it succinctly, what the Court decided was that knowledge alone, without intent, without aim to promote the conspiracy is not sufficient to brand one as a participant in the conspiracy.

That this was the mind of the Circuit Court is made clear by Judge Hand's reference to the Court's earlier decision in *United States* v. *Peoni*, 100 F. (2d) 401. Said Judge Hand:

> "In that case we tried to trace down the doctrine as to abetting and conspiracy, as it exists in our criminal law, and concluded that the seller's knowledge was not alone enough." (Opinion, R. 234, at 236–237.)

Much weight of the Government's criticism of the decision of the Circuit Court is placed upon that part of the opinion wherein the Court states "he must in some sense promote their venture himself, make it his own, have a stake in its outcome." (R. 237.) Also in *Backun* v. *United States*, 112 F. (2d) 635, the Circuit Court of Appeals for the Fourth Circuit said "guilt as an accessory depends, not on 'having a stake' in the outcome of crime, as suggested in the Falcone case."

The theory of criminal liability for which the Government contends rules out the presence or absence of a stake in the criminal enterprise, but concedes it is of important evidentiary significance. But the Government's theory limits the evidentiary significance to a determination of the presence or absence of knowledge on the part of the seller. (Gov. Brief, page 24.)

It is unimportant to the decision of the question here, that a stake may be evidentiary of knowledge, because the Circuit Court of Appeals assumed in its decision, knowledge. The point obviously made by Judge Hand in his opinion is that in the absence of a stake in the enterprise, in the absence of the seller's promotion of the venture himself, in the absence of anything to show he made the venture his own, there cannot be said to be intent and participation in the venture branding the seller as an actual participant in the conspiracy. The Circuit Court's words were used in application to the facts of this particular case. In other words, in this record, the Circuit Court of Appeals found no promotion of the illegal venture by these respondents themselves. It found they did not make it their own. It found they did not have a stake in its outcome. In other words, they found lacking in the case, facts necessary to evidence the essential element of intent.

Reason as we will, we must return to the proposition that the Circuit Court of Appeals found as to these respondents no evidence of any participation in criminal activity. The Court did assume knowledge on the part of the respondents and held that knowledge alone is not sufficient. This statement of the law the Government concedes to be correct. (Gov. Brief, page 22.)

> "To constitute an accomplice one must be so connected with a crime that at common law he might himself have been con-

> victed either as the principal or as an accessory before the fact. To warrant such a conviction the one accused must have taken part in the perpetration of, or preparation for, the crime, with intent to assist in the crime. Every act which may have a tendency to assist in the perpetration of the crime is not of absolute necessity criminal. Before it will have that effect it must have been done with the *intention* on the part of the actor that it shall aid in the commission of the crime."

People v. *Zucker*, 20 App. Div. (N. Y.) 363 at 365. Affirmed on Opinion below, 154 N. Y 770.

Again may we refer to the opinion of the Circuit Court of Appeals wherein it is stated:

> "It is not enough that he does not forego a normally lawfully activity of the fruits of which he knows that others will make an unlawful use;" (R. 237.)

It is respectfully submitted that a contrary doctrine would be not only unsound but dangerous.

The Government by its phrasing of the question presented to this Court seeks a rule upon a proposition of law, abstract rather than concretely applicable to the facts of this case and the decision of the Circuit Court of Appeals. It seeks a rule which would encompass all, but which would leave to "the restraint of prosecutors and the common conscience of Court and jury," not culpability, but immunity

from conviction or pardon of guilt. (Gov. Brief, page 26.) Such doctrine is unsound. To establish its danger it is not necessary to resort to the "simple and familiar dialectic of suggesting doubtful and extreme cases," which met the disapproval of this Court in *Santa Cruz Co. v. Labor Board*, 303 U. S. 453. The char woman cleaning the office of the conspirators (Gov. Brief, page 25), may be an extreme example. The merchants selling commodities of which thousands may be put to criminal purposes, the automobile dealer, the gasoline dealer and many others of like occupation are real and proximate examples as were the telephone service men in *State* v. *Coleman*, 126 Fla. 203. If knowledge alone, without intent or other participation, satisfies the requirements of the definition of a conspirator, the rule is extended beyond all the bounds of necessity for reasonable regulation of human conduct, the chief aim of all law.

There are of course, in most penal systems, degrees of crime mainly dependent upon the seriousness of the acts or omissions which constitute culpability. The statements of this Court in *Santa Cruz Co.* v. *Labor Board, supra*, are not in point here. True, as this Court pointed out in that case, the question of degree is constantly met in various relations. The Court aptly cited problems arising before the Inter-State Commerce Commission as to whether an intra state carrier causes undue and unreasonable discrimination against inter state or foreign commerce; and under the Employer's Liability Act,

whether the employee's occupation at the time of his injury is in inter-state transportation, or in work so closely related to such transportation as to be practically a part of it; and in the enforcement of the Clayton Act, whether the effect of provisions in contracts for the sale of commodities is to substantially lessen competition.

Other instances of degree might be cited familiar to the every day practitioner, such as the degree of care required of common carriers, or of the ordinary citizen in the operation of his automobile, or of owners of real property in the maintenance of their property, or even of lawyers and physicians in the practice of their professions.

But such measurements of degree extremely differ from a situation where a person comes squarely within the definition of the Government's proposed rule, and is a criminal offender. It would be a reversal of the fundamental theory of our jury system, to leave to the "conscience" of the jury whether it would acquit or convict after having found the facts proving a defendant guilty under the law. Indeed, the "hypothetical people who fix the leaking roof at the still or sell the gambling house one pack of cards," knowing the nature of the enterprise they are assisting, and the "char woman who, in the ordinary course of her duties, cleans the offices which the conspirators use," knowing of the criminal plan, (Gov. Brief, page 25) would be subject to conviction if the rule advocated by the Government were law.

Throughout the brief of the Government it is taken for granted that the Circuit Court of Appeals found or assumed that these respondents knew of the existence of a conspiracy.

It is respectfully submitted that no such fact was found or assumption made. On page 20 of the Government's brief, referring to *Young* v. *United States*, 48 F. (2d) 26, it is stated: "If there was no existing conspiracy known to the defendant, there was no basis for convicting him as an accessory to an existing conspiracy; and there was no evidence that he actually conspired with anyone himself."

On this appeal we find these respondents far more remote from the operation of stills than were the defendants in the *Young* case. These respondents, Joseph and Salvatore Falcone, did not sell to distillers and are not charged with selling to distillers. Yet in that case the Court said:

> "The conviction of the sellers cannot be sustained on the ground that they had knowledge of the intention of the purchasers to use the sugar and other articles in connection with the unlawful manufacture of liquor. One cannot be held as a member of a conspiracy upon proof merely that he had knowledge of, or negatively acquiesced, in a crime that was about to be committed. But in order to fasten guilt upon one of being a conspirator, it is necessary to prove that he actively participated in the conspiracy charged. Bishop's Criminal Law (9 Ed.)

Sec. 633; 5 R. C. L. 1065; McDaniel v. United States (C. C. A.) 24 F. (2d) 303."

Young v. *United States*, 48 F. (2d) 26 at 27.

In *DiBonaventura* v. *United States*, 15 F. (2) 494, the Trial Court gave to the jury a rule of law similar to that for which the Government here contends. The Trial Court said: "If these things alleged, still, mash barrels, and so forth, went into his property with his knowledge and consent, he is an accessory to the crime of conspiracy, that is what I mean to say." And again the Trial Court said "if he knew this was going on in his property and he doesn't stop it, he becomes an accessory to the crime of conspiracy." But on appeal the Circuit Court, Fourth Circuit, held the charge went too far, and reversed the conviction. In its opinion the Court said:

> "But a landlord is not necessarily guilty of conspiracy to violate the Prohibition Act, merely because he has knowledge that liquor is being manufactured on his premises and does not stop it. As has been often said, the gist of the crime of conspiracy is the unlawful agreement. 'Conspiracy exists whenever there is a combination, agreement, or understanding, tacit or otherwise, between two or more persons for the purpose of committing an unlawful act.' Fisher v. U. S. (C. C. A. 4th) 13 F. (2d) 756; Pettibone v. U. S. 148 U. S. 197, 13 S. Ct. 542, 37 L. Ed. 419; Commonwealth v. Hunt, 4

Metc. (Mass.) 111, 38 Am. Dec. 346. The conspiracy to commit the crime is an entirely different offense from the crime which is the object of the conspiracy. U. S. v. Rabinowich, 238 U. S. 78, 35 S. Ct. 682, 59 L. Ed. 1211; Fisher v. U. S. supra."

CONCLUSION

It is, therefore, respectfully submitted that the question presented to this Court by the Government differs materially from the rule followed by the Circuit Court of Appeals; that the Court below correctly applied the law to the case of these respondents, and that its decisions should be affirmed.

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